



**IN THE MALAWI SUPREME COURT OF APPEAL
SITTING AT BLANTYRE**

MSCA CIVIL APPEAL NO. 15 OF 2020
(Being High Court Principal Registry Civil Cause No 15 of 2016)

BETWEEN:

KAREN MSISKA APPELLANT

AND

THE TIMES GROUP RESPONDENT

**CORAM: HON. JUSTICE L.P. CHIKOPA SC, J.A.
HON. JUSTICE F.E. KAPANDA SC, J.A.
HON. JUSTICE H. POTANI, J.A.
HON. JUSTICE J. KATSALA, J.A.
HON. JUSTICE I.C. KAMANGA, J.A.
HON. JUSTICE M.C.C. MKANDAWIRE, J.A.
HON. JUSTICE S.A. KALEMBERA, J.A.
HON. JUSTICE R. MBVUNDULA, J.A.
HON. JUSTICE D. nyakaKAUNDA KAMANGA. J.A.**

Ndlovu, Counsel for the Appellant
Chakhala, Counsel for the Respondent
Shaibu, Judicial Research Officer
Mnthunzi, Minikwa, Recording Officers
Mwantinti, Msimuko, Court Reporters

JUDGMENT

Mbvundula, JA:

The appellant instituted an action against the respondent in the High Court seeking compensation for unfair dismissal which the respondent denied. When the case was first called for hearing the respondent applied for an adjournment. On the matter further being set down for hearing the respondent and their lawyer did not show up, no reasons having been given for the non-attendance. The Court then proceeded to hear the appellant's case. Nonetheless the Court found the appellant's case to be ill-conceived and without merit and dismissed it in its entirety with costs.

The appellant was initially employed by the respondent as a news reporter and later promoted to various other positions within the respondent's group of companies. His dismissal came about on allegations of serious misconduct, namely, consuming alcohol whilst on duty. He challenged the dismissal in the High Court contending that there was no valid reason for the termination of his employment and that even though he was called to a disciplinary hearing, the said hearing was a mere sham and amounted to a kangaroo court aimed at rubber stamping the decision that had already been made against him. It was his argument that the termination of his employment did not comply with section 57 of the Employment Act and that he was entitled to severance allowance. He further claimed pension emoluments up to the day of the termination of his employment. The respondent denied all allegations and contended that there was a valid reason for the termination of the appellant's employment and that the appellant was afforded a fair hearing in terms of section 57 of the Employment Act.

Section 57 of the Employment Act provides as follows:

- (1) The employment of an employee shall not be terminated by an employer unless there is a valid reason for such termination connected with the capacity or conduct of the employee or based on the operational requirements of the undertaking.
- (2) The employment of an employee shall not be terminated for reasons connected with the capacity or conduct before the employee is provided an opportunity to defend

himself against the allegations made, unless the employer cannot reasonably be expected to provide the opportunity.

The appellant has appealed against the decision of the Court below to this Court seeking a reversal of the findings of the Court below.

The appellant's grounds of appeal are that:

1. The Court below erred in law in not taking into account the evidence of the appellant;
2. The Court below erred in law in failing to analyse the issues in light of the evidence;
3. The Court below misdirected itself in law by failing to apply the facts to the law and arrive at a correct conclusion;
4. The Court below erred in law and fact in holding that the appellant was fairly dismissed from employment; and
5. The decision of the Court below is against the weight of the evidence.

The appellant seeks from this Court the following reliefs:

1. An order setting aside the decision of the Court below;
2. A finding that the appellant was unfairly dismissed from his employment;
3. An order that the appellant is entitled to compensation for unfair dismissal, severance pay and an account of his pension benefits;
4. Any other order this Court deems fit and proper in the circumstances;
5. An order for costs.

The appellant was dismissed on allegations of consuming alcohol whilst on duty contrary to the terms and conditions of his employment contract. His version of events is that he reported for duties at 8.30 on the material day but left the workplace to collect his laptop in Blantyre. He stated that at 9.30 the Editor of the Sunday Times called him to find out where he was and he explained where he was. It is his case that thereafter he returned to work and prepared a news article which he submitted by 5 pm on that day.

About ten or so days later the appellant received a letter requiring him to attend a disciplinary hearing to answer the following charges:

- a) That on the material day he reported for duties very late at around 12 noon whilst drunk;
- b) That in his drunken state he was found sleeping behind a desk;
- c) That after he was woken up by the Editor of the Sunday Times the appellant staggered all over the newsroom smelling of alcohol and went to the Editor's office and started crying;
- d) That he thereafter went outside the newsroom to the corporate reception and started dancing in front of guards.

The appellant attended the disciplinary hearing after which he was handed a letter of dismissal authored by the respondent's Finance and Administration Manager. An appeal to the Managing Director of the respondent against the decision went against him.

The appellant faults the appellant for not having accorded him an opportunity to cross-examine his accusers. Counsel for the appellant argued that the appellant was under a duty to present the accusers to be cross examined by him. No law was cited supporting this argument. In our considered view the position should be that where a person in the shoes of the appellant desires to cross examine his accusers the employer's obligation to present the accusers for cross examination arises when a request is made by the accused employee that such persons be made available for cross examination. We also take into consideration the observation made in the case of *Mtungila v Malawi Posts Corporation* [2006] MLR 46 (HC) that "the disciplinary hearing conducted by the defendant should not be equated to a court hearing in criminal cases. Then we would be turning disciplinary hearings into courts of law which is not supposed to be the case." We accordingly find that the respondent did not fail in its duty to make available the appellant's accusers for cross examination.

Concerning the reasons for the termination of his employment, which the appellant claims were not valid, firstly the appellant claims that the grounds stated in the notice for him to attend the disciplinary hearing are different from those contained in the letter of dismissal, and secondly that the reason in the said letter of dismissal, namely consuming alcohol whilst on duty was wrongly arrived at.

The appellant's contention that the reason for which he was dismissed, namely consuming alcohol whilst on duty, was not included in the notice to attend the disciplinary hearing is untrue. The material part of the notice reads:

The details of indiscipline against you are that on 31st January 2015 you reported for duties very late around 12 noon *whilst drunk*. It is further alleged that *in your drunkenness* you were found sleeping behind your desk. It had to take Innocent Chitosi, the Sunday Times Editor, to wake you up. You staggered all over the newsroom, smelling of alcohol and went to Innocent Chitosi's office and started crying and claiming that someone was after your life. After that you went out of the newsroom to the corporate reception and started dancing in front of the guards. (Our emphasis)

Regarding the appellant's contention that that the reason given in the letter of dismissal, namely consuming alcohol whilst on duty, was wrongly arrived at is also untrue. After the decision of the disciplinary panel the appellant appealed against that decision to the Managing Director of the respondent. Under ground number 4 of his grounds of appeal he stated as follows:

The panel failed to notice in its determination that the purported *level of drunkenness* is heavily outweighed by the evidence of work done. While I conceded *that I smelled of beer* and duly explained its source, the originator of the charges took no account of the job I performed ... (Our emphasis)

Section 57(1) of the Employment Act and the case of *Sugar Corporation of Malawi v Manda* [2007] MLR 389 (SCA) make it clear that the termination of any contract of employment to be valid, that an employee must be afforded substantive fairness and that there be a valid reason for the termination of employment. The contention by the appellant that the reason for the dismissal was not a valid reason is sharply contradicted by the appellant's own written statement which has been reproduced above. Further to that, the report of the disciplinary panel disclosed that when the appellant's attention was drawn to the fact that he smelled of alcohol he, among other things, said it was alcohol from the previous night's drinking. It cannot therefore lie in his mouth that he was not under the influence of alcohol whilst on duty. We find therefore that the dismissal was upon a valid reason, namely, allowing himself to be under the influence of alcohol whilst on duty.

Counsel for the appellant submitted that because the respondent was not represented and did not appear at the hearing in the Court below and yet the court went on to

find against him, the provisions of section 62 (1) of the Employment Act were thereby violated. The section reads as follows:

(1) In any claim or complaint arising out of the dismissal of an employee, it shall be for the employer to provide the reason for dismissal and if the employer fails to do so, there shall be a conclusive presumption that the dismissal was unfair.

In the view of counsel for the appellant, the fact that the respondent was not represented in the Court below meant that the respondent failed to provide reasons for the dismissal of the appellant as required under section 61 (1) of the Employment Act. It was counsel's opinion that the alleged failure amounted to a breach of procedural justice and that the court below ought to have found against the respondent. Counsel, in our finding, grossly misdirected himself. The requirement under section 61 (1) of the Act for the employer to give reasons for the dismissal arises in the course of the disciplinary proceedings and not in court, in the event of the employee suing the employer. The respondent met this requirement by firstly informing the appellant of the charges he was to face, and after the hearing, by informing him why his employment was being terminated. There was in this regard no procedural failure on the part of the respondent.

Further, the procedure taken by the court was in accordance with the established practice that is enunciated in the case of *Registered Trustees of the Church of Disciples v Produce Export Co Ltd* [1994] MLR 280 (HC) and *Makala v Attorney-General* [1998] MLR 187 (HC) that when the trial of an action is called and one party does not appear, the court has power to proceed with the trial. The position in the present case is that the appellant, who was present during the trial, had the burden of proof and had to lead evidence in order to prove his claim. As explained in the case of *Ngwalo v Unitrans Malawi Ltd* [2000–2001] MLR 352 (HC) the court had to proceed to consider and evaluate the evidence of the appellant in the same manner as it would have been the case if the respondent was available. Which the court did.

All in all we find the judgment of the Court below to be flawless and dismiss the appeal.

Concerning the issue of costs, this matter being a labour matter, was supposed to be instituted in the Industrial Relations Court rather than in the High Court. As a result

of its being instituted in the wrong court the respondents was exposed to avoidable costs. We therefore order that the respondent do recover its costs here and below.

Pronounced in open court at Blantyre this 13th day of October 2022.

We concur.

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HON. JUSTICE R. MBVUNDULA, J.A.

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HON. JUSTICE L.P. CHIKOPA SC, J.A.

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